Menteri Hal Ehwal Luar Negeri, Malaysia & Ors v Sundra Rajoo a/l Nadarajah

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-30–01 OF 2020
HANIPAH FARIKULLAH, HADHARIAH ISMAIL AND CHE MOHD RUZIMA JJCA
6 OCTOBER 2020

Administrative Law — Judicial review — Application for — Respondent claimed immunity by reason of his position a former director of Asian International Arbitration Centre (Malaysia) — High Court allowed application — Appeal against decision — Whether respondent immune from criminal prosecution — Whether immunity should have been tested in criminal court — Whether decision of second appellant to prosecute respondent was subjected to judicial review — International Organisations (Privileges and Immunities) Act 1992 s 4 — Federal Constitution art 145(3)

This was an appeal by the appellants against the decision of the learned High Court judge in allowing an application by the respondent for judicial review. The respondent was a former director of Asian International Arbitration Centre (Malaysia) ('AIAC'). The respondent was arrested while he was still the director and detained overnight by the third appellant. The prosecutors then sought a seven-day remand order and took the position that since the respondent had already resigned, he was no longer entitled to any immunity. The learned magistrate dismissed the remand application having heard arguments from the respondent on the ground of the respondent's immunity. The respondent commenced judicial review proceedings where he alleged that he was adversely affected by: (a) the act of the first appellant in writing to the Secretary-General of the Asian African Legal Consultative Organisation for a waiver of his immunity; (b) the act of the third appellant in arresting and detaining him; and (c) the possibility of being charged with criminal offences by the second appellant. The application for leave was dismissed by the High Court and on the same day, the respondent was charged with three charges under s 409 of the Penal Code. The respondent appealed against the decision of the High Court and the Court of Appeal allowed the appeal and the respondent was granted leave for judicial review proceedings. The High Court allowed the respondent's application and hence this appeal. The issues for consideration were: (i) whether the respondent as a former High Officer of AIAC was immune from criminal prosecution; (ii) whether the immunity should rightly have been tested in the criminal court; and (iii) whether the decision of the second appellant to prosecute the respondent was subjected to judicial review.

Held, allowing the appeal: A

(1) The word 'other legal process' in Part II of the Second Schedule of the International Organisations (Privileges and Immunities) Act 1992 ('the Act') would tend to suggest that broader construction of the words should be adopted. Therefore, it would include criminal proceedings. After his resignation as a High Officer, the respondent no longer had the status of a diplomatic agent for actions taken during his time in office and he was not immune from criminal jurisdiction. Having regard to the provisions of the Act, art 31 of the Schedule in Diplomatic Privileges (Vienna Convention) Act 1966 should not be applicable to a case like the present. The respondent being a former High Officer of AIAC, could not have the benefit of complete immunity from criminal jurisdiction under the Act. The presence of s 4(1) read together with Part II of the Second Schedule and s 4(7) of the Act, was sufficient to reveal the clear intention of Parliament to enact that a former High Officer, shall only be entitled to immunity from criminal prosecution in respect of acts done by him in his capacity as a High Officer (see paras 62, 74, 89 & 92). B C D

(2) The acts or things done by the respondent in relation to the criminal charges should have been tested and answered in criminal proceedings in the sessions court and not by judicial review proceedings. It was only after the production of all evidence that the court would be able to determine whether or not the charges were in respect of acts and things done in the respondent's capacity as a High Officer. Without the proper context, the issue of whether or not the respondent was immune from criminal charges could not be determined (see paras 107 & 109). E F

(3) The effect and meaning of art 145(3) of the Federal Constitution had been settled by a long line of decisions of the apex courts which had held that the decision of the Attorney General to institute or not to institute criminal proceedings was not justifiable or amendable to judicial review. It followed that the decision of the second appellant was not susceptible to judicial review (see paras 127 & 130). G

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap keputusan hakim Mahkamah Tinggi yang bijaksana yang membenarkan permohonan responden untuk semakan kehakiman. Responden adalah bekas pengarah Pusat Timbang Tara Antarabangsa Asia (Malaysia) ('AIAC'). Responden ditangkap semasa dia masih menjadi pengarah dan ditahan semalaman oleh perayu ketiga. Pendakwa kemudian memohon perintah tahanan reman tujuh hari dan mengambil keputusan bahawa kerana responden sudah meletak jawatan, dia tidak lagi berhak mendapat kekebalan. Majistret yang bijaksana menolak permohonan reman setelah mendengar hujahan daripada responden dengan alasan kekebalan responden. Responden memulakan prosiding semakan H I

kehakiman di mana dia mendakwa bahawa dia terjejas oleh: (a) tindakan perayu pertama secara bertulis kepada Setiausaha Agung Pertubuhan Perundingan Undang-Undang Asia-Afrika untuk pengecualian kekebalannya; (b) tindakan perayu ketiga dalam menangkap dan menahannya; dan (c) kemungkinan dituduh melakukan kesalahan jenayah oleh perayu kedua. Permohonan kebenaran ditolak oleh Mahkamah Tinggi dan pada hari yang sama, responden didakwa dengan tiga pertuduhan di bawah s 409 Kanun Keseksaan. Responden mengemukakan rayuan terhadap keputusan Mahkamah Tinggi dan Mahkamah Rayuan membenarkan rayuan tersebut dan responden diberi kebenaran untuk prosiding semakan kehakiman. Mahkamah Tinggi membenarkan permohonan responden dan oleh itu rayuan ini. Isu-isu untuk pertimbangan adalah: (i) sama ada responden sebagai bekas Pegawai Tinggi AIAC kebal daripada pendakwaan jenayah; (ii) sama ada kekebalan sepatutnya diuji di mahkamah jenayah; dan (iii) sama ada keputusan perayu kedua untuk mendakwa responden tertakluk kepada semakan kehakiman.

Diputuskan, membenarkan rayuan:

(1) Perkataan 'proses undang-undang lain' dalam Bahagian II Jadual Kedua Akta Organisasi Antarabangsa (Keistimewaan dan Kekebalan) 1992 ('Akta') cenderung menunjukkan bahawa pembinaan kata-kata yang lebih luas harus diterima pakai. Oleh itu, ia merangkumi prosiding jenayah. Setelah meletak jawatan sebagai Pegawai Tinggi, responden tidak lagi mempunyai status sebagai agen diplomatik untuk tindakan yang diambil semasa dia memegang jawatan dan dia tidak kebal dari bidang kuasa jenayah. Dengan mengambil kira peruntukan Akta, perkara 31 Jadual dalam Akta Keistimewaan Diplomatik (Konvensyen Vienna) 1966 tidak boleh terpakai untuk kes seperti sekarang ini. Responden yang merupakan bekas Pegawai Tinggi AIAC, tidak boleh mendapat faedah kekebalan sepenuhnya daripada bidang kuasa jenayah di bawah Akta. Kehadiran s 4(1) yang dibaca bersama dengan Bahagian II Jadual Kedua dan s 4(7) Akta, cukup untuk menunjukkan niat jelas Parlimen untuk menetapkan bahawa seorang bekas Pegawai Tinggi, hanya berhak mendapat kekebalan dari pendakwaan jenayah berkenaan dengan tindakan yang dilakukan olehnya dalam jawatannya sebagai Pegawai Tinggi (lihat perenggan 62, 74, 89 & 92).

(2) Perbuatan atau perkara yang dilakukan oleh responden berkaitan dengan pertuduhan jenayah seharusnya diuji dan dijawab dalam prosiding jenayah di mahkamah sesyen dan bukan melalui proses semakan kehakiman. Hanya setelah mengemukakan semua bukti bahawa mahkamah dapat menentukan sama ada atau tidak pertuduhan berkenaan dengan tindakan dan perkara yang dilakukan dengan kemampuan responden sebagai Pegawai Tinggi. Tanpa konteks yang tepat, isu sama ada responden kebal atau tidak terhadap pertuduhan jenayah tidak dapat ditentukan (lihat perenggan 107 & 109).

(3) Kesan dan makna perkara 145(3) Perlembagaan Persekutuan telah diselesaikan oleh beberapa keputusan mahkamah tertinggi yang memutuskan bahawa keputusan Peguam Negara untuk memulakan atau tidak memulakan prosiding jenayah tidak dapat dibenarkan atau dibuat melalui semakan kehakiman. Oleh itu, keputusan perayu kedua tidak terdedah kepada semakan kehakiman (lihat perenggan 127 & 130).]]

Cases referred to

Al-Malki and another v Reyes (Secretary of State for Foreign and Commonwealth Affairs and another intervening) [2019] AC 735, SC (refd)

Bat v Investigating Judge of the German Federal Court [2011] EWHC 2029 (Admin), QBD (refd)

Blackland Park Exploration Ltd v Environment Agency [2003] EWCA Civ 1795, CA (refd)

Chang Suan Tze v Minister for Home Affairs [1988] 2 SLR 525 (refd)

Dato' Param Cumaraswamy v MBF Capital Bhd & Anor [1997] 3 MLJ 824, CA (refd)

Dato' Seri Anwar bin Ibrahim v Mohamad Hanafiah bin Hj Zakaria & Ors [2010] 2 MLJ 271, HC (refd)

Derbyshire County Council v Times Newspapers Ltd [1992] 3 WLR 28, CA (refd)

Government of Malaysia v Lim Kit Siang; United Engineers (M) Bhd v Lim Kit Siang [1988] 2 MLJ 12, SC (refd)

Islamic Financial Services Board v Puan Marlin Fairol bt Mohd Faroque and Anor [2010] MLJU 653; [2010] 8 CLJ 173, HC (refd)

Johnson Tan Han Seng v PP; Soon Seng Sia Heng v PP; PP v Chea Soon Hoong; Teh Cheng Poh v PP [1977] 2 MLJ 66, FC (refd)

Karpal Singh & Anor v PP [1991] 2 MLJ 544, SC (refd)

Khairuddin Abu Hassan v Tan Sri Mohamed Apandi Ali [2017] 4 CLJ 701, CA (refd)

Law Society of Singapore v Tan Guat Neo Phyllis [2007] SGHC 207, HC (refd)

Long bin Samat & Ors v PP [1974] 2 MLJ 152, FC (refd)

Mohd Rafizi bin Ramli v PP [2014] 3 MLJ 114, CA (refd)

Mohit v Director of Public Prosecutions of Mauritius [2006] UKPC 20, PC (refd)

Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal [2019] 3 MLJ 443, FC (refd)

PP v Zainuddin & Anor [1986] 2 MLJ 100, SC (refd)

R v Governor of Pentonville Prison, ex parte Teja [1971] 2 QB 274, QBD (refd)

R v Madan [1961] 1 All ER 588 (refd)

Regina v Secretary of State for The Home Department, ex parte Brind and others [1991] 1 AC 696, HL (refd)

Regina v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte [2001] 1 AC 61, CA (refd)

Regional AIAC for Arbitration v Ooi Beng Choo & Anor Civil Appeal No W-01–160 of 1998, CA (refd)
Repco Holdings Bhd v PP [1997] 3 MLJ 681, HC (refd)
Republic of the Philippines v Maler Foundation and others [2008] SGCA 14, CA (refd)
Tan Sri Eric Chia v Attorney General [2005] 4 MLJ 433, HC (refd)
Teh Cheng Poh v PP [1979] 1 MLJ 50, PC (refd)

Legislation referred to

Criminal Justice Act 1988 [UK] s 134(1)
Criminal Procedure Code s 51A(1)(c)
Diplomatic Privileges (Vienna Convention) Act 1966
Diplomatic Privileges Act 1964 arts 29, 31, 39, Schedule 1
Extradition Act 1989 [UK] ss 2, 8(1)
Federal Constitution art 145, 145(3)
Government Proceedings Act 1956 s 9, 9(1)
Industrial Relations Act s 20(3)
International Organisations (Privileges and Immunities) Act 1992 ss 3(1), 4(1), 4(7), 8A(2), First Schedule, Second Schedule, Part I, II, Third Schedule, Fourth Schedule, Fifth Schedule
Islamic Financial Services Board Act 2002 s 7, Schedule
Islamic Financial Services Board (Privileges and Immunities) Regulations 2002 reg 2
Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996 reg 3A, 3A(1), (2), (3)
Penal Code s 409
Rules of the High Court 1980 O 53
Constitution of Singapore [SG] art 35(8)
State Immunity Act 1978 Part I, ss 1(1), 14(1)
Taking of Hostages Act 1982 [UK] s 1(1)

Appeal from: Judicial Review Application No WA-25–108–03 of 2019 (High Court, Kuala Lumpur)

Narkunavathy Sundareson (Natra bt Idris and Noor Atiqah bt Zainal Abidin with her) for the appellants.
K Shanmuga (Abd Shukor Ahmad, Baljit Singh Sidhu, Ankit R Sanghvi and Dinesh Kumar with him) (Kanesalingam & Co) for the respondent.

Hanipah Farikullah JCA:

INTRODUCTION

[1] The appellants appealed against the decision of the learned High Court judge dated 31 December 2019 allowing an application by the respondent for

judicial review. This case raises important questions in relation to the respondent's immunity from criminal proceedings and the power of the attorney general (the second appellant), acting under art 145(3) of the Federal Constitution to charge a person in respect of which he claimed immunity from criminal proceedings.

[2] In this present case, the respondent contended that he can assert immunity so as to prevent the second appellant from charging him. The respondent claimed immunity by reason of his position as a former Director of Asian International Arbitration Centre (Malaysia) ('AIAC'), which was previously known as the Kuala Lumpur Regional Centre for Arbitration ('KLRCA').

THE FACTS

[3] From 1 March 2010 to 20 November 2018, until his resignation on 21 November 2018, the respondent was the Director of AIAC.

[4] The AIAC was first established in the late 1970s. Its continued existence is pursuant to a series of international agreements between an international body called the Asian African Legal Consultative Organisation ('AALCO') and the Government of Malaysia (the fourth appellant). AALCO is an international organisation consisting of 47 countries from Asia and Africa as State Parties with the aim to promote and provide for international arbitration in the Asian and African regions.

[5] The respondent, a Malaysian citizen, was appointed as the Director of AIAC by the Government of Malaysia, the fourth appellant in consultation with the Secretary General of AALCO.

[6] The respondent was arrested on 20 November 2018 while he was still the Director and detained overnight by the third appellant.

[7] The prosecutors then sought a seven-day remand order and took the position that since the respondent had already resigned, he was no longer entitled to any immunity. The learned magistrate dismissed the remand application having heard arguments from the counsel for the respondent on the ground of the respondent's immunity.

[8] On 5 March 2019, the respondent commenced judicial review proceedings seeking for the following reliefs:

(a) a declaration that the appellant has immunity as a former High Officer being the Director of the AIAC for acts done within his official capacity;

(b) a declaration that on a proper interpretation of Act 485, the respondent's immunity as a former High Officer of the AIAC cannot be waived;

(c) a declaration that a Director, Acting Director or any other officer of AIAC or otherwise has no power to waive the respondent's immunity;

(d) an order of prohibition preventing the second appellant from laying any charge or bringing any proceedings in any court in Malaysia against the respondent with regard to anything done by the respondent in his capacity as a Director of the AIAC, and specifically with regards to any acts or omissions by the respondent during his term of office as Director of the AIAC in relation to the property, funds or documents of the AIAC or otherwise howsoever in relation to the affairs of the AIAC;

(e) an order or prohibition preventing the third respondent from arresting, detaining, issuing any warrant or other order or otherwise bringing any judicial proceedings whatsoever against the respondent with regards to anything done by the respondent in his capacity as Director of the AIAC, and specifically with regards to any acts or omissions by the applicant during his term of office as Director of the AIAC in relation to the property, funds or documents of the AIAC or otherwise howsoever in relation to the affairs of the AIAC; and

(f) an order of certiorari to remove into the High Court and quash forthwith any document purporting to waive the applicant's immunity.

[9] The respondent in his judicial review application alleged that he was adversely affected by:

(a) the act of the first appellant in writing to the Secretary-General of the AALCO for a waiver of his immunity;

(b) the act of the third appellant in arresting and detaining him on 20 November 2018; and

(c) the possibility of being charged with criminal offences by the second appellant.

[10] The respondent contended that the above was done in complete disregard to the immunity he enjoys as a former Director of the AIAC.

[11] The application for leave was dismissed by the High Court on 26 March 2019 and the appellants filed an appeal against that decision to the Court of Appeal. On the same day, the respondent was charged with three charges under s 409 of the Penal Code in the Kuala Lumpur Sessions Court vide Case No WA-62R-15–03 of 2019 and the respondent claimed trial to all the charges.

[12] The respondent was accused of criminal breach of trust. The charges are based on the fact that the respondent authorised monies belonging to AIAC to be spent to purchase copies of books authored by him and published by the international publishing company LexisNexis. The books that were purchased were then distributed by the AIAC.

[13] The respondent's appeal against the decision of the High Court was allowed by this court and the respondent was granted leave for judicial review proceedings on 23 May 2019.

[14] On 30 August 2019, the respondent also secured an order to stay the criminal proceedings against him in the sessions court pending the hearing and disposal of the substantive application and the appeals therefrom.

HIGH COURT'S DECISION

[15] Before the High Court, the respondent advanced the contention that as a former High Officer of AIAC, he was afforded privileges and immunities in relation to actions taken by him in his official capacity. The respondent also argued that the second appellant's prosecutorial powers in instituting the criminal charges against him on the basis of the said immunity are fettered.

[16] In response, the appellants argued that the respondent's judicial review should be dismissed because the respondent was not immune from criminal jurisdiction and that the second respondent's prosecutorial powers under art 145(3) of the Federal Constitution are not amenable to judicial review.

[17] It is the appellants' case that:

(a) the second appellant has an unfettered discretion when prosecuting which cannot be challenged in this court;

(b) the question of immunity should be raised in the criminal proceedings in the sessions court as a preliminary issue or as a substantive defence; and

(c) the respondent's immunity as a former High Officer of AIAC does not extend to immunity from criminal proceedings.

[18] After hearing the parties, the High Court allowed the respondent's application and made the following orders:

(a) a declaration that the respondent has immunity as a former High Officer being the Director of AIAC for acts done within his capacity as High Officer;

(b) a declaration that a Director, Acting Director or any other officer of AIAC or otherwise has no power to waive the respondent's immunity;

(c) an order of prohibition preventing the second appellant from laying any charges or bringing any proceedings or continuing the proceedings in WA-62R-15–03 of 2019 or any other proceedings in any court in Malaysia against the respondent with regards to anything done by the respondent in his capacity as the Director of AIAC and specifically with regards to any acts or omissions by the respondent during his term of office as Director of AIAC in to the property, fund or documents of AIAC or otherwise howsoever in relation to the affairs of AIAC; and

(d) an order of certiorari to quash forthwith the three criminal charges filed against the respondent in Kuala Lumpur Sessions Court in Case No WA-62r-15–03 of 2019.

[19] After securing the orders under the judicial review proceedings and in light of the order of certiorari specifically quashing the three criminal charges against him, the respondent was discharged of the same in the sessions court on 22 January 2020.

[20] The grounds of the High Courts' decision on the following key issues may be summarised as follows.

The respondent's immunity

[21] The learned High Court judge set out the legal principles which she was to apply. She stated that:

> The immunity guaranteed by Part II of the Second Schedule Act of 485 is that the applicant is immune from suit and other legal processes in respect of acts and things done in his capacity as such an officer. The court refers to Stroud's Judicial Dictionary of Word and Phrases 5th Edition Vol 4 by London Sweet & Maxwell Limited 1986, the word 'process' means:
>
> > PROCESS (2) — 'Process' is the doing of something in a proceeding in a civil or criminal court, and that which may be done without the aid of a court is not a 'process'.

[22] With that proposition in mind, the learned High Court judge took the view, then went on to state that the words 'other legal process' entails both civil and criminal proceedings, rejecting the argument by the appellants that the immunity does not cover criminal proceedings. Hence, the court found that the respondent was immune from criminal charges in respect of acts and things done in his capacity as High Officer.

[23] Referring to s 8A(2) of the International Organisations (Privileges and

Immunities) Act 1992 (Act 485), the High Court also held that the immunities of the respondent can only be waived by the AALCO, being the international organisation under whose auspices the AIAC operates.

Whether the second appellant's decision is amenable to judicial review

[24] The learned High Court judge was of the view that art 145(3) of the Federal Constitution gives unfettered discretion to the attorney general to institute, conduct or discontinue any proceedings for criminal offence.

[25] However, relying on the recent Federal Court's decision in *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443, the learned High Court judge opined that the second appellant discretion to bring prosecutions is not something that is outside the scope of judicial review.

[26] Based on the above reasons, the learned High Court judge was of the view that since the respondent was a Director of AIAC and now a former High Officer of AIAC:

(a) the second appellant's decision to charge the respondent is subject to judicial review; and

(b) the respondent is immune from any legal process and the criminal action taken against him by the second and third appellants contravened with Act 485 and is therefore void and unlawful and should be quashed.

THE ISSUES IN THIS APPEAL

[27] It is noted that the issues and arguments presented by the parties in this appeal are substantially the same as those submitted before the High Court.

[28] The grounds of appeal, although expressed at much greater length in the appellant's submission, reflect the following issues:

(a) whether the respondent as a former High Officer of AIAC is immune from criminal prosecution;

(b) whether the immunity should rightly have been tested in the criminal; and

(c) whether the decision of the second appellant to prosecute the respondent is subject to judicial review.

[29] We adopted these three questions as the pivotal questions in this appeal and deal with them in turn.

[30] After full arguments, we decided to allow the appeal. The whole of the parties written and oral submissions have been taken into the conclusions which we have referred to below.

The relevant laws

[31] To understand the issues raised in the appeal, it is necessary to have regard to the regime dealing with the immunity granted to the AIAC's Director contained in the 2013 host country agreement and the regime dealing with Act 485, Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996 ('the 1996 Regulation'), and Diplomatic Privileges (Vienna Convention) Act 1966 (Act 636). We will discuss in more detail the relevant legislations in the later part of our judgment.

2013 host country agreement

[32] On 26 March 2013, the Government of Malaysia (the fourth appellant) entered into an agreement with AALCO relating to the Regional AIAC for Arbitration in Kuala Lumpur (2013 host country agreement).

[33] The relevant part of the 2013 host country agreement, for the present purposes, is found in article III which provides the following:

> ARTICLE III
>
> PRIVILEGES AND IMMUNITIES OF THE AIAC AND PROFESSIONAL STAFF
>
> 1. The AIAC shall enjoy such privileges and immunities as may be necessary for the purpose of executing its functions including immunity from suit and legal process.
>
> 2. The Host Government shall take the necessary steps to ensure that the premises of the AIAC, its property, assets and archives and all documents belongings to it or held by it shall be inviolable.
>
> 3. The Host Government shall take the necessary steps to ensure that:
>
> (i) the AIAC be exempted from customs duties in respect of equipment used by it for its official purposes; and
>
> (ii) the AIAC, its assets, funds, income and other property whether owned or occupied shall be exempted from tax.
>
> 4. Foreign professional staff of the AIAC shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity.
>
> 5. Foreign professional staff of the AIAC shall be exempted from taxation on the salaries and emoluments paid to them by the AIAC.

6. The Director of the AIAC, if he is a citizen of Malaysia, shall be entitled to such privileges and immunities as determined by the Minister pursuant to Act 485.

[34] It can be seen that cl 6 of article III clearly indicates that if the Director of the AIAC is a Malaysian citizen, the privileges and immunity that he or she can enjoy will be determined by the Minister pursuant to Act 485. Therefore, the right to immunity for the respondent who is a citizen of Malaysia is not specifically provided in the 2013 host country agreement. However, parties to the 2013 host country agreement agreed that the immunity to be enjoyed by the Director of AIAC if he is a Malaysian citizen shall be as determined by the Minister (in this case Minister for foreign affairs) pursuant to Act 485. In fact, as we have stated earlier, pursuant to this agreement, the Minister has prescribed reg 3A of the 1996 Regulations.

WHETHER THE RESPONDENT AS A FORMER HIGH OFFICER OF AIAC IS IMMUNE FROM CRIMINAL PROSECUTION

[35] The central question in this appeal is whether the respondent as a former High Officer is immune from criminal prosecution in respect of the charges advanced against him at the sessions court.

[36] The primary submission advanced by learned senior federal counsel is that as a Malaysian, the respondent enjoys immunity from suit and other legal process in respect of acts and things done in his capacity as a former High Officer of AIAC. Considering the entire scheme and the provisions of Act 485, learned senior federal counsel submitted that this immunity does not extend to criminal jurisdiction. Learned senior federal counsel contended that the learned judge failed to take into account the scope of the privileges and immunities afforded by Act 485.

[37] Learned senior federal counsel further submitted that the learned High Court judge did not appreciate that the immunity from personal arrest and detention is distinct from the immunity from suit and other legal process in respect of acts and things done in his official capacity.

[38] The appellants' argument is disputed by the respondent. In gist, it was submitted for the respondent as follows:

(a) during his term of office, the High Officer is equated to a 'diplomatic agent'. However, because the respondent is a Malaysian citizen of Malaysia, sub-s 4(7) of Act 485 provides that a high officer who is a citizen of Malaysia only enjoys these privileges and immunities 'in respect of acts and things done in his capacity as such an officer';

(b) after his resignation, as a former High Officer, that position continues whether or not the High Officer was a citizen or not. The former High Officer, as specified in Part II of the 4th Schedule, has 'immunity from suit and from other legal process in respect of acts and things done in his capacity as such an officer';

(c) arts 29 and 31(1) of the Vienna Convention provide for the absolute immunity from arrest and criminal jurisdiction of diplomatic agents based on the following:

(i) art 29 states that:

> The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

(ii) art 31(1) guarantees that:

> a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state.

(d) after being forced to resign as the former Director and High Officer of the AIAC, being an international organisation, the respondent still had the status of a diplomatic agent for actions taken during his time in office. He is therefore conferred and vested with, by law, immunity from suit and from other legal process in respect of things done in his capacity as High Officer and this extends even

to criminal jurisdiction, pursuant to art 31(1) of the Vienna Convention.

[39] During the argument, our attention has been drawn to the following authorities to support the respondent's position that he is immune from any legal process including criminal prosecution.

[40] In *Islamic Financial Services Board v Puan Marlin Fairol bt Mohd Faroque and Anor* [2010] MLJU 653; [2010] 8 CLJ 173, the Islamic Financial Services Board (the appellant), applied for an order of certiorari under O 53 of the Rules of the High Court 1980 to quash the entire award of the Industrial Court. The respondent/claimant was employed by the appellant with effect from 2 June 2003. She was subsequently dismissed on 28 May 2004 on the ground of unsatisfactory performance. The matter was referred to the Industrial Court under s 20(3) of the Industrial Relations Act. The Industrial Court found in favour of the respondent and awarded her compensation in lieu of reinstatement and backwages. The main issue arising was in relation to the jurisdiction of the court to hear the matter on the grounds that the appellant was an international organisation invested with privileges and immunities

under s 7 of the Islamic Financial Services Board Act 2002 ('the IFSB Act'), reg 2 of the Islamic Financial Services Board Regulations and the schedule to the IFSB Act.

[41] The court held that the words 'legal process':

(a) any number of dictionary definitions can be quoted here in support of a plain and logical meaning of the term 'legal process';

(b) *Black's Law Dictionary* (6th Ed): The term is sometimes used as equivalent to 'lawful process'. Thus, it is said that legal process means process not merely fair on its face, but in fact valid. But properly it means a summons, writ, warrant, mandate or other process issuing from a court;

(c) *Burton's Legal Thesaurus* (4th Ed): summons, summons for a case, summons for a cause in court, summons for a controversy before a court, summons for a legal action, summons for a legal contest, summons for a legal controversy, summons for a legal dispute, summons for a trial, summons for an action at law, summons for legal proceedings, summons for litigation, summons for suit at law, writ. Associated concepts: means to compel appearance; and

(d) it can be observed the above definitions are couched in very wide terms, to include of course proceedings in a proper court of law, but they do not exclude other forms of lawful process.

[42] Learned counsel for the respondent submitted that a similar conclusion was reached by this court in respect of the AIAC itself in another case involving the Industrial Court in *Regional AIAC for Arbitration v Ooi Beng Choo & Anor* Civil Appeal No W-01–160 of 1998 (Court of Appeal decision dated 2 August 1999), where this court held that the appellant, in that case, the Regional AIAC for Arbitration was declared to be immune from suit and legal process which includes a reference to the Industrial Court of a complaint of a dismissal under the Industrial Relations Act 1967.

International Organisations (Privileges and Immunities) Act 1992 — Act 485

[43] We now turn to consider the question whether according to our domestic law, the respondent has a right to immunity from criminal jurisdiction. Act 485 lies at the heart of the present case. Act 485 is expressed in its preamble to be 'An Act relating to privileges and immunities of certain international organisation and persons connected, therewith and for other purposes'. In our opinion, Act 485 is intended to provide the sole source of the Malaysian law on this issue.

[44] Article 2 contains a number of definitions of which at this point, it is to note that the phrases 'international organisation' is defined to mean 'an organisation that is declared by the regulations to be an international organisation to which Act 485 applies'.

[45] Regulation 2 of the 1996 Regulations provides that the AIAC as an international organisation to which s 4 of the Act applies.

[46] Since in the present case, we are concerned with immunity from criminal prosecution, it is necessary to consider s 4(1) of Act 485 to be read with the Second Schedule and in particular s 4(7).

[47] Section 4 of Act 485 titled 'privileges and immunities of certain international organisations and persons connected therewith' provides for the conferral, by regulations, of privileges and immunities on entities and persons in the following terms:

> (1) Subject to this section, and to subsections 11(3), 11(4) and 11(5), the Minister may by regulations either with or without restrictions or to the extent or subject to the conditions prescribed in such regulations
>
> (a) ...
>
> (b) confer —
>
> (i) upon a person who is, or is performing the duties of, a High Officer all or any of the privileges and immunities specified in Part I of the Second Schedule; and
>
> (ii) upon a person who has ceased to be, or perform the duties of, a high officer the immunities specified in Part II of the Second Schedule
>
> (c) confer —
>
> (i) upon a person who is accredited to, or is in attendance at, an international conference convened by an international organisation as a representative of—
> (A) a country other than Malaysia;
> (B) another international organisation; or
> (C) an overseas organisation,
> all or any of the privileges and immunities specified in Part I of the Third Schedule;
>
> (ii) upon a person who has ceased to be accredited to such an organisation, or has attended such a conference, as such a representative the immunities specified in Part II of the Third Schedule;
>
> (d) confer—
>
> (i) upon a person (not being a high officer) who holds an office in an international organisation all or any of the privileges and immunities specified in Part I of the Fourth Schedule; and

(ii) upon a person who has ceased to hold such an office the immunities specified in Part II of the Fourth Schedule; and

(e) confer—

(i) upon a person who is serving on a committee, or is participating in the work, of an international organisation or is performing, whether alone or jointly with other persons, a mission on behalf of such an organisation all or any of the privileges and immunities specified in Part I of the Fifth Schedule; and

(ii) upon a person who has served on such a committee or participated in such work or has performed such a mission the immunities specified in Part II of the Fifth Schedule.

[48] It is relevant to note that Part I and II of the Second Schedule provides as follow:

PART I

PRIVILEGES AND IMMUNITIES OF HIGH OFFICER

The like privileges and immunities (including privileges and immunities in respect of a spouse and children under the age of twenty-one years) as are recorded to a diplomatic agent.

PART II

IMMUNITIES OF FORMER HIGH OFFICER OF INTERNATIONAL ORGANISATION

Immunity from suit and from other legal process in respect of acts and things done in his capacity as such an officer.

[49] Section 2 of Act 485 provides that 'diplomatic agent' has the same meaning assigned to it by Act 636.

[50] What presents as a specific question about exemption from 'criminal jurisdiction' is also a more general question about entitlement to the range of privileges and immunities specified in the Schedules of Act 485.

[51] Based on the above provisions, a number of matters should be noted. First, under s 4 of Act 485, by reference to the First to Fifth Schedules of Act 485, certain privileges and immunities are extended to an international organisation to which the Act applies and then on different bases to different categories of persons 'connected' with that international organisation. The Schedules set the limits of the privileges and immunities that are to be extended to an international organisation and the different categories of persons connected with that international organisation.

[52] For individuals, it was correctly pointed out by learned senior federal counsel that the immunities and privileges include:

(a) immunity from personal arrest or detention (example: Third Schedule Part I Clause 1, Fifth Schedule Part I Clause 1, Seventh Schedule sections 11A and 22A and Eighth Schedule section 13A;

(b) immunity from suit and other legal process in respect of acts and things done in his capacity as such an office bearer (example: Second Schedule Part II, Third Schedule Part I Clause 2, Fourth Schedule Part I Clause 1 and Part II);

(c) exemption from the application of laws relating to immigration and obligation to perform national service (example: Third Schedule Part I Clause 5, Fourth Schedule Part I Clause 3 and 4 and Seventh Schedule sections 18C and D; and

(d) exemption from currency or exchange restrictions, excise duties, sales taxes duties and income tax on official salaries and emoluments (example: Third Schedule Part I Clauses 6 and 7, Fourth Schedule Part I Clauses 2 and 5 and Fifth Schedule Part I Clause 5).

[53] The argument at the hearing before us tend to focus primarily on the Second Schedule of Act 485 and the far more significant is s 4(7).

[54] It is of significance to note that s 4(7) provides that a High Officer or an Officer of an international organisation who is Malaysian citizen *is not entitled* under this section to any of the privileges or immunities in the Second and Fourth Schedules respectively, *except in respect of acts and things done in his capacity as such an officer*'.

[55] It is plain that s 4(7) draws a distinction in respect of the entitlement to privileges and immunities of a High Officer who is a Malaysian citizen. There can be no doubt that s 4(7) limits the scope of immunities which a High Officer who is a Malaysian citizen, enjoy under the Second Schedule 'to acts and things done in his capacity as such an officer'.

The Kuala Lumpur Regional AIAC for Arbitration (Privileges and Immunities) Regulations 1996

[56] Pursuant to ss 3(1) and 4(1) of Act 485, the Minister had prescribed Kuala Lumpur Regional AIAC for Arbitration (Privileges and Immunities) Regulations 1996.

[57] Regulation 3 provides that the AIAC shall have juridical personality and such legal capacities as are necessary for the exercise of its powers and the performance of its functions and shall also have the privileges and immunities

specified in the First Schedule to the Act.

[58] Regulation 3A provides as follows:

> (1) A High Officer, if he is not a citizen of Malaysia, shall have the privileges and immunities as specified in Part I of the Second Schedule to the Act.
>
> (2) *A High Officer, if he is a citizen of Malaysia, shall only be entitled to the privileges and immunities in respect of acts and things done in his capacity as the High Officer*.
>
> (3) *A former High Officer shall have the immunities specified in Part II of the Second Schedule to the Act.* (Emphasis added.)

[59] In the eyes of the law, there is a difference between the range of immunity accorded to a High Officer, if he is not a citizen, a High Officer who is a citizen and a former High Officer irrespective of his citizenship status. The obvious purpose and effect of reg 3A(2) read with s 4(7) of Act 485 were clearly intended to differentiate the range of privileges and immunities that are accorded to a High Officer who is Malaysian citizen in contrast to a non-citizen.

[60] Further, it seems to us that the wording of reg 3A(2) and (3) is very much narrower in its ambit than reg 3A(1). A High Officer, who is noncitizen is entitled to privileges and immunities provided under Article 31 of Act 638 and that expressly includes immunity from criminal jurisdiction.

[61] However, a question arises whether Part II of the Second Schedule applies to criminal proceedings.

[62] Part II of the Second Schedule must be considered by reference to the words used having regard to the purpose and context of the provisions in question. That provision makes reference to the words 'other legal process'. In our view, these words would tend to suggest that broader construction of the words 'any other legal process' should be adopted. Therefore, we are of the view that the word 'other legal process' would include criminal proceedings.

[63] In the case of *Regina v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* [2001] 1 AC 61, the Court of Appeal explained that 'legal process' includes both civil and criminal proceedings. One of the issues that arose on appeal was whether the applicant enjoyed immunity in respect of such crimes. The facts of the case are as follows: The applicant, a former head of state of Chile who was on a visit to London, was arrested under a provisional warrant issued by a metropolitan stipendiary magistrate pursuant to s 8(1) of the Extradition Act 1989 following the receipt of an international warrant of arrest issued by the Central Court of Criminal Proceedings No 5, Madrid alleging that the applicant, when head of state, has murdered Spanish

citizens in Chile within the jurisdiction of Spain. Six days later, a second s 8(1) warrant was issued by a magistrate upon receipt of a second international warrant of arrest issued by the Spanish court alleging, inter alia, that the applicant, during his period of office, had ordered his officials to commits acts falling within the definition of hostage-taking in s 1(1) of the Taking of Hostages Act 1982 and torture in s 134(1) of the Criminal Justice Act 1988. The applicant issued proceedings in the Divisional Court for orders of certiorari to quash the first provisional warrant as disclosing no act amounting to an extradition crime, as defined by s 2 of the Act 1989, and both warrants as relating to acts performed by the applicant in the exercise of his functions as head of state and in respect of which he was entitled to immunity under customary international law and the provisions of ss 1(1) and 14(1) in Part I of the State Immunity Act 1978 and s 20(1) in Part III of the Act of 1978 read with s 2, and articles 29, 31 and 39 of Schedule 1 to, the Diplomatic Privileges Act 1964. The Divisional Court having found that the first warrant was bad as falling to immunity from civil and criminal process in the English courts in respect of acts committed in the exercise of sovereign power. The court quashed both warrants. On appeal by the Commissioner of Police of the Metropolis and the Government of Spain, the court held that there can be no doubt that the immunity of the head of state, where *ratione personae* or *ratione materiae*, applies to both civil and criminal proceedings. This is because the immunity applied to any form of legal process.

[64] Having considered that the words 'other legal process' include criminal proceedings, the next question is whether any limits are placed on the immunity in respect of criminal offences allegedly committed by a former High Officer. In approaching this question, we have scrutinised Part II of the Second Schedule and reg 3A(3). In its application to a former High Officer, these provisions refer to 'acts and things done in his capacity as such an officer' as a condition to a claim to immunity. Therefore, blanket immunity from criminal prosecution as contended by the respondent is in principle impermissible.

[65] For the reasons discussed above, bearing in mind the words used in Part II of the Second Schedule, we consider that the word 'other legal process' in Part II of the Second Schedule would include criminal proceedings.

[66] It is important to note that reg 3A is consistent with cl 6 of the 2013 host country agreement which gives the power to the minister to determine such privileges and immunities to be given to the director of AIAC if he is a Malaysian citizen.

[67] It was common ground between counsels that the validity of the 1996 Regulation is not an issue.

The Diplomatic Privileges (Vienna Convention) Act 1996 (Act 636) A

[68] A further point also arises, namely whether the respondent is entitled to the immunity under Act 636.

[69] Act 636 provides for the 'diplomatic privileges and immunities by giving effect to the Vienna Convention on Diplomatic Relations (signed in 1961) and for other matters connected herewith'. B

[70] Article 31(1) of the Vienna Convention which is incorporated in the Schedule of Act 636 provides as follows: C

> ARTICLE 31
>
> (1) A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of — D
>
> (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
>
> (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State; and E
>
> (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions. F

[71] It is clear that Act 636 read as a whole, is applicable to a 'diplomatic agent' within the meaning of s 2 of Act 636.

[72] Accordingly, pursuant to the construction of s 4(1)(b) and (7) of Act 485 read together with reg 3A of the 1966 Regulations as mentioned earlier, in our view article 31(1) of the Act 636 is only applicable to a 'High Officer' who is not a Malaysian citizen. G

[73] The Scope of article 31(1) of Act 636 which is similar to art 31(1) of the Diplomatic Privileges Act 1964 was discussed in the English case of *Al-Malki and another v Reyes (Secretary of State for Foreign and Commonwealth Affairs and another intervening)* [2019] AC 735, where Lord Sumption JSC stated as follows: H

> Thus article 31(1) confers immunity on diplomatic agents currently in post in respect of both private and official acts, subject to specific exceptions for the three designated categories of private act. Under article 39(2), once a diplomatic agent's functions have come to an end, his immunities under article 31 will normally cease from the moment when he leaves the territory of the receiving state. I

> Thereafter, he remains immune in the receiving state only with respect to 'acts performed ... in the exercise of his functions as a member of the mission'. This is commonly known as the residual immunity. It is one of four cases in which, in contrast to the immunity under article 31, a protected person's immunity is limited to official acts, the others being (i) the immunity conferred on a diplomatic agent who is a national of or permanently resident in the receiving state, which is limited to 'official acts performed in the exercise of his functions' (article 38(1)); (ii) the immunity conferred on administrative and technical staff of a mission, which 'shall not extend to acts performed outside the course of their duties' (article 37(2)); and (iii) domestic staff of the mission, whose immunity is confined to 'acts performed in the course of their duties: article 37(3). The same distinction applies to consular officers and employees under article 43 of the parallel Vienna Convention on Consular Relations (1963). Their immunity is limited to 'acts performed in the exercise of consular functions.
>
> (see also*: A Local Authority v AG and others (Children) (domestic abuse)* [2020] EWFC 18 *and A Local Authority v X and others* [2018] EWHC 874).

[74] Therefore, we do not agree with the respondent submission that after his resignation as a High Officer, the respondent still had the status of a diplomatic agent for actions taken during his time in office and he is immune from criminal jurisdiction. In our view having regard to the provisions of Act 485, article 31 of the Schedule in Act 636 should not be applicable to a case like the present.

[75] It follows that Act 485 and the 1966 Regulations had embodied the whole law on the issue, they would no doubt have had the effect that as a Malaysian citizen, the respondent enjoys privileges and immunities from both civil and criminal proceedings. As a former High Officer, he enjoys immunity from both civil and criminal proceedings because the immunity applies to suit and any other legal process.

[76] However, it is obvious that the immunity he enjoyed in respect of civil and criminal offences is limited to acts and thing done in his capacity as a High Officer.

[77] For the reasons which follow, we respectfully disagree with the learned High Court judge's view that the criminal action taken against the respondent contravened Act 485 and therefore the charges are unlawful and should be quashed.

[78] In our opinion, the authorities cited by the respondents in *Islamic Financial Services Board v Puan Marlin Fairol bt Mohd Faroque and Anor* and *Regional AIAC for Arbitration v Ooi Beng Choo & Anor* dealt with an entirely different situation to that which exists in the present case. Those cases relate to employment and do not support the claim of the respondent to immunity

from criminal charges. With respect to this issue, no authority has been cited to us which shows that a High Officer or a former High Officer who work in an international organisation has previously been held to be entitled to assert immunity in proceedings involving criminal matters.

[79] It is worth recalling that pursuant to s 4(7) of Act 485 read with reg 3A(2) of the 1996 Regulation, a High Officer who is a Malaysian citizen is not entitled to any of the privileges or immunities, inter alia, in the Second Schedule except in respect of acts and things done in his capacity as such an officer. Therefore, we are of the view that parliament had deliberately narrowed its protection in Part II of the Second Schedule in its application to a High Officer who is a Malaysian citizen.

[80] It is also very clear that Part I of the Second Schedule (immunity from criminal jurisdiction) does not apply to the respondent who is now a former officer of AIAC after his resignation. Further, the absence of express reference to 'immunity from criminal jurisdiction' in Part II of the Second Schedule in contrast to Part I shows that Parliament did not intend to provide complete immunity from criminal jurisdiction to a former High Officer, except in respect of acts and things done in his capacity as such an officer. Therefore, the immunity accorded to the respondent under Act 485 is not absolute and it should not be extended unnecessarily. In our view, the current state of law does not grant more extensive immunity to the respondent in contrast to a diplomatic agent under Act 636.

[81] We are also of the view that any criminal act committed by a High Officer or a former High Officer for his personal benefit cannot be regarded as 'acts and things done in capacity as the High Officer'. This is consistent with s 8A(1) of Act 485 which provides that the privileges and immunities conferred under this Act are granted in the interests of the international organisation and overseas organisation and not for the personal benefit of the individuals.

[82] In this present case, it is also of interest to establish whether the 2013 host country agreement guaranteed immunity to the respondent from criminal jurisdiction. Although learned counsel for the respondent relies on the 2013 host agreement, he did not challenge the compatibility of the agreement with Act 485.

[83] As we have stated cl (6) of the 2013 host country agreement gives the Director of the AIAC if he is a Malaysian citizen, such privileges and immunities as determined by the Minister pursuant to Act 485.

[84] It is obvious that there is no mention of complete immunity from criminal jurisdiction in the 2013 host country agreement that is applicable to

the respondent being a Malaysian citizen. In *Regina v Secretary of State for The Home Department, ex parte Brind and others* [1991] 1 AC 696, per Lord Bridge of Harwich at 747–8 that, in construing domestic legislation which is ambiguous, English courts will presume that Parliament intended to legislate in accordance with its international obligations. English courts may also resort to international obligations in order to help resolve uncertainty or ambiguity in judge-made law (see *Derbyshire County Council v Times Newspapers Ltd* [1992] 3 WLR 28, per Balcombe LJ at 44).

[85] In the English Court of Appeal case of *Regina v Secretary of State for The Home Department, ex parte Brind and others* [1991] 1 AC 696, the court stated that:

> The general common law principle of statutory interpretation that an Act of Parliament should if possible be construed so as to further the international obligations of the United Kingdom, and not so as to be inconsistent with them: see *Garland v British Rail Engineering Ltd* [1983] 2 AC 751; see also the practical application of the principle in *Waddington v Miah* [1974] 1 WLR 683, 694, per Lord Reid. The House of Lords has also had regard to the Convention for the purpose of judicial review of ministerial powers: see *Raymond v Honey* [1983] 1 AC 1, 10, *per* Lord Wilberforce. Similarly in *Reg v Board of Visitors of HM Prison, The Maze, Ex parte Hone* [1988] AC 379 the House of Lords held that English law was harmonious with article 6(3)(c) as interpreted by the European Court of Human Rights, but implied that a mismatch between English law and the Convention might be resolved in accordance with the Convention: see in particular, at pp 392–394, per Lord Goff of Chieveley. In *In re KD (A Minor) (Ward: Termination of Access)* [1988] AC 806 the House of Lords similarly sought to ensure that the common law, as well as statute law, was consistent with the Convention as interpreted by the European Court of Human Rights: see, at pp 823–828, *per* Lord Oliver of Aylmerton, where it is implicit that if there had been inconsistency, it would have called for an 'alteration in the basic approach in order to conform with the Convention.' The same approach was adopted in the context of contempt of court, freedom of expression and article 10 in *Attorney-General v British Broadcasting Corporation* [1981] AC 303, 352, *per* Lord Fraser of Tullybelton and, at p 354, *per* Lord Scarman: see also *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 156–158, per Scott J; at p 178 per Sir John Donaldson MR; at p 203 per Dillon LJ; at pp 218–220 per Bingham LJ; at p 256 per Lord Keith; at p 273 per Lord Griffiths and at p 283, per Lord Goff of Chieveley.
>
> (see also *Bennion, Statutory Interpretation, 4th ed (2002), P 698; Garland v British Rail Engineering Ltd* [1983] 2 AC 751*; R (Pepushi) v Crown Prosecution Service* [2004] Imm AR 549*, para 30; R v Brown (Gregory)* [1996] AC 543*, 555; R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696, 747—748; *R v Lyons* [2003] 1 AC 976 and *A v Secretary of State for the Home Department (No 2)* [2005] 1 WLR 414, para 126)

[86] In *R v Governor of Pentonville Prison, ex parte Teja* [1971] 2 QB 274, an Indian citizen was arrested and committed to prison in the United Kingdom

pending his extradition to face criminal charges including breach of trust preferred against him in India. The applicant contended that he was a diplomatic agent and not liable to any form of arrest or detention in the United Kingdom under the Diplomatic Privileges Act 1964 an Act which enacts and makes part of the law of that country certain articles of the Vienna Convention on Diplomatic Relations 1961. Lord Parker CJ discussed the immunity of diplomatic representation and said that immunity depends on mutual agreement on the person entitled to the immunity.

[87] The case law demonstrates that English courts now refer to the relevant provisions of the Convention in interpreting those provisions, for the purpose of ensuring where possible that the domestic law is in conformity with the Convention. That is the approach whether the court is construing legislation, reviewing the exercise of administrative discretion, or declaring and applying the common law. Where however an Act of Parliament cannot be construed so as to be consistent with the Convention, then the English courts must apply the statute and leave the complainant to seek redress on the international plane. (*Regina v Secretary of State for The Home Department, ex parte Brind and others* [1991] 1 AC 696).

[88] In this present case, we would adopt the principles cited in the above authorities for the purpose of interpreting Act 485.

[89] In this connection, the respondent being a former High Officer of AIAC, cannot have the benefit of complete immunity from criminal jurisdiction under Act 485. In our opinion, such a result can only be achieved in a treaty by express agreement, with the effect that it cannot be achieved by implication. In our view, parties to the 2013 host agreement did not intend to provide complete exemption from criminal jurisdiction to be a condition of the agreement, to a former high officer.

[90] However, generous and purposive its approach to interpretation, the court's task remains one of interpreting the written document to which the contracting states have committed themselves. It must interpret to what they have agreed (*R v Governor of Pentonville Prison, ex parte Teja* [1971] 2 QB 274).

[91] Further, it is noted that during the passing of the International Organisations (Privileges and Immunities) Bill in the Dewan Rakyat, the Minister of Foreign Affairs, states, inter alia, stated as follows:

> Walaupun kita memberi keistimewaan dan kekebalan kepada orang yang tertentu tetapi tidaklah pada keseluruhannya ataupun seluas-luasnya seperti yang dianggapkan oleh Ahli Yang Berhormat yang berkenaan.

> Contohnya, setiap keistimewaan dan kekebalan itu kita buat mengikut perjanjian dan hubungan kita dengan negara yang berkenaan ataupun agensi agensi antarabangsa yang berkenaan. Walaupun disenaraikan dalam Rang Undang-undang ini berbagai-bagai keistimewaan dan kekebalan tetapi tidak semuanya diberi secara umum begitu sahaja tetapi mengikut negara yang tertentu ataupun agensi yang tertentu. Kita hanya reciprocate apa yang kita dapat oleh negara yang berkenaan, tidak kurang dan tidak lebih daripada itu, malah biasanya pegawai yang tertinggi sahaja yang mendapat kebanyakan keistimewaan dan kekebalan yang tertentu. Pegawai-pegawai atau kakitangan yang lain tidak mendapat keseluruhannya keistimewaan dan kekebalan kerana mereka tertakluk kepada undang-undang jenayah Negara kita. Maknanya kita boleh mengambil tindakan mengikut undang-undang dalam negara kita kepada mereka yang tidak mendapat keistimewaan yang berikut, hanya setengah sahaja yang dapat keistimewaan yang tertentu. Kalaupun mereka yang mendapat keistimewaan tertentu itu melakukan jenayah dalam negara kita, kita boleh mengambil tindakan dengan mengambil satu pendirian dan mengisytiharkan mereka itu sebagai *persona non grata* dan ini akan menjejaskan nama baik. Bukan sahaja peribadi mereka yang akan terjejas, malah negara mereka ataupun badan yang mereka menganggotai itu juga akan sama-sama menerima padahnya di atas pendirian ataupun pengisytiharan yang boleh kita buat kalau mereka benar-benar dapat dibuktikan sebagai telah membuat kesilapan daripada sabit jenayah dalam negara kita.

[92] In our view, the presence of s 4(1) read together with Part II of the Second Schedule and s 4(7) of Act 485, is sufficient to reveal the clear intention of Parliament to enact that a former High Officer, shall only be entitled to immunity from criminal prosecution in respect of acts done by him in his capacity as a High Officer.

[93] For these reasons, it is implausible to suggest that the legislation intended to accord complete immunity from criminal proceeding to a former High Officer who is a Malaysian citizen like the respondent in this case. That would in our view amount to altering the scope of Act 485.

[94] If we may add, the scope of criminal immunity asserted by a person who holds high ranking office in the United Kingdom was discussed in *Bat v Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin). The facts are as follows. The defendant, who was the Head of the Office of National Security of Mongolia, was arrested in the United Kingdom pursuant to a European arrest warrant issued in Germany with a view to his prosecution there for offences of kidnap and false imprisonment. The warrant alleged that in 2003, the defendant, together with three other members of the Mongolian Secret Service, had kidnapped a Mongolian national in France, believing him to have been involved in the assassination of the Mongolian Minister of the Interior five years previously, and taken him to the Mongolian Embassy in Berlin where they held him for several days before taking him back to Mongolia. Before the extradition hearing, in response to a request from the

district judge, the Secretary of State for Foreign and Commonwealth Affairs wrote to the district judge expressing the view that the defendant had not been on a special mission to the United Kingdom on behalf of the Mongolian Government at the time of his arrest and stating that the Foreign and Commonwealth Office had not consented to the defendant visiting the United Kingdom on a special mission. The district judge ordered the defendant's extradition to Germany. The defendant appealed on the grounds, inter alia, that he enjoyed immunity in customary international law on the bases that: (i) at the time of his arrest, he had been visiting the United Kingdom on a special mission on behalf of the Mongolian Government; (ii) at the time of his arrest, he had been representing his government as a very high-ranking civil servant; and (iii) the crimes in respect of which his extradition was sought were official acts committed by him on the orders of the Mongolian Government.

[95] Dismissing the appeal Moses LJ states as follows:

> 56. In the International Court of Justice's judgment of 14 February 2002 in Case concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v Belgium*) [2002] ICJ Rep 3, para 51 the court said:
>
> > in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a state, such as the head of state, head of government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other states, both civil and criminal.
>
> [57] The court went on to observe that the immunities afforded to ministers for foreign affairs were not for their personal benefit, but to ensure the effective performance of their functions. Such officials are recognised, under international law, as representative of the state solely by virtue of their office: para 53. To expose a Minister for Foreign Affairs to legal proceedings might deter that minister from international travel when required to do so for official functions.
>
> [58] The ICJ reiterated those propositions in *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep 177. It is of note that in that case the court appears to have endorsed the view of France that a Djiboutian Procureur de la République and Head of National Security did not enjoy immunity as persons occupying high-ranking offices in the state: see paras 185–186.
>
> [59] In his Second Report to the International Law Commission on the immunity of state officials from foreign criminal jurisdiction (International Law Commission, 62nd Session, Geneva 2010 A/CN.4/631), the Special Rapporteur Kolodkin described the immunity as being enjoyed by a narrow circle of high-ranking state officials: see summary, para 94(i). The wording of the ICJ in *Democratic Republic of Congo v Belgium*, which I have quoted above, demonstrates that the paradigm of those entitled to such immunity is a head of state or head of government. The words 'such as', whilst indicating that the list is not limited to those they identify, also carries with it the implication that in order to fall within that narrow circle it must be possible to attach to the individual in question a similar status.

A [60] Defence Ministers and a Minister of Commerce have been afforded that immunity by district judges in *In re Mofaz* (2004) 128 ILR 709, and in *In re Bo Xilai* (2005) 128 ILR 713.

B [61] It is clear to me that the defendant falls outwith that narrow circle. In British terms, he is a civil servant whose counterparts, so the UK contends, would be someone of director level, at a mid-rank in the FCO. The documents showing his job description and his authority, shown to the court by the Government of Mongolia, underline his status as an administrator far removed from the narrow circle of those who hold the high-ranking office to be equated with the state they personify and with those identified by the International Court of Justice.

C [62] The district judge rejected the claim partly on the grounds that the defendant was not engaged in foreign affairs. I do not regard that as a ground for rejection of the claim. It was plainly the purpose of the defendant's visit to discuss matters of mutual security concern and, had he held the status which customary international law would regard as of sufficient high rank, that purpose would not entitle the UK to deprive him of immunity. But for the reasons I have given, the defendant did not attain that rank and is not entitled to immunity by reason of his position as Head of the Executive Office of the National Security Council of Mongolia.

D

E **[96]** To the extent that the learned High Court judge arrived at a different conclusion, she was with respect in error.

THE IMMUNITY SHOULD RIGHTLY HAVE BEEN TESTED IN THE CRIMINAL COURT

F

[97] We turn now to an argument of the appellant that the issue of the respondent's immunity should rightly have been tested in the criminal court.

[98] This issue was raised by the appellant in the High Court but the learned G High Court judge did not deal with this point at all in her judgment. The real consequences of the learned High Court judge holding that the criminal charges against the respondent is unlawful and should be quashed are that the issue whether the acts and things are done by the respondent in his capacity as a High Officer or such former High Officer would never be decided by the H court (*Republic of the Philippines v Maler Foundation and others* [2008] SGCA 14).

[99] Learned senior federal counsel in her written and oral submissions I urged that the question of whether the respondent is immune from the criminal charges ought to have been tested in criminal proceedings in the sessions court. It is a question of fact and would require consideration of all the evidence relating to and in support of the criminal charges.

[100] It was argued for the appellant that the criminal charges are related to acts and things he did as the High Officer of AIAC and therefore, it should be decided by the criminal court.

[101] On the contrary, in his oral submission, learned counsel for the respondent argued that the sessions court has no jurisdiction over the respondent in respect of criminal charges on the basis of the respondent's immunity. It was argued that the alleged act that he did was done in his capacity as a High Officer. In support of his submissions, learned counsel referred to the English case of *R v Madan* [1961] 1 All ER 588, EWCA, the convictions recorded against a member of the Indian High Commission on a guilty plea were quashed, despite a later waiver issued by a representative of the High Commission, because the waiver had not expressly stated that it was to act retrospectively. Crucially, the English Court of Appeal found that the lower courts had no jurisdiction over the diplomat in the absence of a valid and effectual waiver of his immunity.

[102] It was further submitted for the respondent that the appellants ought to have adopted the position taken by the relevant public authorities as set out in the English Court of Appeal in *Blackland Park Exploration Ltd v Environment Agency* [2003] EWCA Civ 1795, where the court pointed out the following at paragraph:

> [16] It is clear to my mind that applications under Part 40.20 should not be utilised to by-pass or delay the criminal process whether in environmental cases or any other branch of the law. However, there are in my view very exceptional circumstances in the present case that fully justify the present proceedings. There is no dispute about the essential facts. Both parties are anxious to have a discreet point of law clarified. They both have a genuine interest in the outcome. Indeed the applicant has been keen to have the issue resolved from well before the Landfill Regulations came into force and commenced the present proceedings before they did so. There is neither the existence nor the threat of criminal proceedings. Both sides simply want the law clarified. It was agreed that the respondent would not take criminal proceedings pending the outcome of the litigation. Picking up the way in which Lord Rodger of Earlsferry put it at 250E in Rushbridger, the interests of justice require that the applicant should be able to obtain the ruling of the civil court before continuing with a course of conduct that could lead to prosecution. For my part I am entirely satisfied that it was appropriate for the judge to hear the application.

[103] There is a number of reasons which persuade us that it would be inappropriate at this juncture for us to declare that the criminal charges are related to acts and things the respondent did as a High Officer of AIAC.

[104] In approaching this question, it is important to bear in mind what was explained by this court in *Dato' Param Cumaraswamy v MBF Capital Bhd & Anor* [1997] 3 MLJ 824:

> ... an assertion of immunity is not to be likened to the rubbing of the lamp by Aladdin. There is no magic in it. Any belief entertained to the contrary must be abandoned soonest.
>
> Each case where immunity is asserted has to be dealt with on its own facts. Whether a particular fact pattern attracts immunity is for the courts to decide in the exercise of their constitutional function. If a court holds that immunity does not attach to an individual in a given set of circumstances that is an end of the matter. The governing principles are well settled. But their application varies according to the peculiar circumstances of each case.

[105] A case perhaps more closely in point is the High Court decision in *Dato' Seri Anwar bin Ibrahim v Mohamad Hanafiah bin Hj Zakaria & Ors* [2010] 2 MLJ 271. Anwar Ibrahim, the applicant sought a similar prohibition order to bar the respondents from prosecuting him. The applicant was given a written statement pursuant to s 51A(1)(c) of the Criminal Procedure Code and the statement read 'TIADA'. The applicant alleged that there were medical reports that were favourable to him and that in omitting those reports, the respondents had acted irrationally. Aziah Ali J (as she then was) held as follows:

> The applicant is at liberty to raise objections to the written statement in the trial itself. The remedy is available before the criminal court during the trial process. The final decision whether or not there are facts favourable to the respondent or whether the two medical reports are favourable to the respondent will be made by the trial judge.

[106] The court in *Dato' Seri Anwar* also considered *Government of Malaysia v Lim Kit Siang; United Engineers (M) Bhd v Lim Kit Siang* [1988] 2 MLJ 12 and *Tan Sri Eric Chia v Attorney General* [2005] 4 MLJ 433 and concluded that the civil court has no jurisdiction to review any act of the public prosecutor undertaken in the discharge of his obligations under the Criminal Procedure Code. Any challenge ought to be raised in the criminal court exercising its criminal jurisdiction.

[107] We accepted the principles cited in the above authorities. The crucial question is not whether the respondent falls within the definition of Part II of the Second Schedule; he plainly does. The question is whether the charges relate to the act done in his capacity as a High Officer (*Regina v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*). Therefore, we agreed with the appellants that the question of whether the acts or things done by the respondent in relation to the criminal charges should have been tested and answered in criminal proceedings in the sessions court and not by judicial review proceedings.

[108] If a prosecution were to be instituted against the respondent, the prosecution would have presented all the evidence in the sessions court in

support of the criminal charges against the respondent. The first question on the charges is to decide whether acts done by the respondent are done in his capacity as a High Officer. That would have allowed him to assert his immunity as a shield against the charges. He cannot use the immunity as a sword to pre-empt the criminal proceedings.

[109] In our view, having regard to the circumstances, in this case, we agreed with learned senior federal counsel's submission that it is only after the production of all evidence that the Court would be able to determine whether or not the charges are in respect of acts and things done in the respondent's capacity as a High Officer. Without the proper context, the issue of whether or not the respondent was immune from criminal charges cannot be determined.

[110] Before the sessions court, the critical question for decision is whether the alleged acts in the charges were carried out by the respondent in the performance of his functions as a High Officer. This is something that the court must determine on the basis of its own evaluation of evidence. The Second Schedule to Act 485 is the statutory defence available to the respondent in relation to the charges proffered against him.

[111] Lastly, it is not our function in this appeal to decide whether there is evidence to substantiate the allegations and the respondent denies them (*Regina v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*).

[112] For the reasons we have given, whether the respondent does exercise such function as a High Officer and accordingly has immunity from suit is ultimately a question for the sessions court to determine based on the evidence and arguments laid before the court.

The decision of the public prosecutor to prosecute

[113] The remaining question is whether the decision of the second appellant to prosecution under art 145(3) is amenable to judicial review.

[114] It was submitted for the appellants that the learned High Court judge erred in law when she held in paras 18 to 20 of her judgment that art 145(3) of the Federal Constitution gives unfettered discretion to the second appellant to institute, conduct or discontinue any proceedings for criminal offence.

[115] The learned High Court judge referred to the Federal Court decision in *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443.

[116] We are compelled to differ from the learned High Court judge about that.

[117] It is necessary to recall that *Chin Chee Kow* concerned the Attorney General's statutory powers under s 9(1) of the Government Proceedings Act 1956 (Act 359). The central issue in the two appeals was whether the decision of the Attorney General (AG) to grant or refuse his consent under s 9 of the Government Proceedings Act 1956 ('the GPA') in respect of two trust proceedings was justiciable and reviewable by the courts. In the first appeal ('Appeal No 58'), a testator had willed funds and lands to trustees under a public charitable trust to build, inter alia, a pagoda for worshippers of a particular Buddhist deity ('the deity') so that they could carry out their religious rites. When after many years, nothing was done by the trustees to carry out the testator's wishes and all funds that were allocated for that purpose were spent, the association representing the followers of the deity sought public funding to build the pagoda. As interested donors wanted the association to become a trustee of the funds to ensure the project was well-managed, the association sought the AG's consent under s 9(1) of the GPA to its proposed application to the High Court to be made a trustee in addition to or in replacement of the existing trustees of the trust. The AG refused to give his consent. The respondent sought leave of court to file proceedings to quash the AG's refusal and order him to grant the consent. The AG objected to the leave application on the ground his refusal was non-justiciable. The High Court disagreed with the AG and granted the association leave to file for judicial review. The Court of Appeal upheld the decision. Both the Courts held that the AG did not have absolute discretion to refuse his consent as the matter was not only non-criminal but also involved public interest and left the association without any recourse or remedy if the AG refused to give his consent. In the second appeal ('Appeal No 59'), a piece of land which was subject to a perpetual religious and charitable trust for the joint benefit of Burmese and Thai communities in Penang was, with the court's sanction, divided into two lots and given as trust properties to the two respective communities. The second to the fifth appellants ('A2–A5'), who were the trustees for the Burmese lot, entered into a joint venture agreement with a developer to commercially develop their lot. The first appellant ('Five Star') was the joint-venture company formed to oversee and implement the development. The Burmese lot was later subdivided into two lots — one registered in Five Star's name and the other in the names of A2–A5. When Five Star filed proceedings to evict the second respondent ('R2') from its lot, R2 objected by saying the lot was part of the land belonging to public trust and that it could not be sold or transferred without the AG's consent. R2 then applied to, inter alia, set aside all the transfers of the respective lots into the names of the appellants. On discovering that the AG had consented to R2's setting-aside application, the appellants applied for leave to quash the said consent. The AG objected on the ground that his decision to give consent was non-justiciable.

[118] The Federal Court dismissed Appeal No 58 and allowed Appeal No 59 and held that the AG's power to give consent or otherwise under s 9(1) of the GPA is not absolute and is subject to legal limits.

[119] Coming back to the present case, the learned High Court judge referred to the following passage in the case of *Chin Chee Kow*:

> (1) The AG's power to give consent or otherwise under section 9(1) of the Government Proceedings Act 1956 was not absolute and was subject to legal limits. Unfettered discretion was contradictory to the rule of law.
>
> (2) ...
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> (3) The court could not agree with the contention that the orthodox common law immunity from judicial review of the AG's prerogative powers laid down in *Gouriet v Union of Post Office Workers* [1978] AC 435 was still good law in view of the House of Lord's decision in *was still good law in view of the House of Lord's decision in Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374 this latter landmark decision moved the courts from a position of deciding whether prerogative power existed to decide if they were being carried out lawfully. The judgment of Gouriet's case was a reflection of past judicial refusal to enquire into the way in which a prerogative power has been exercised. With the progressive development of judicial review, the courts have been more willing to review the exercise of discretionary power. The present position was that the AG was no longer regarded as the sole guardian of what was public interest, which was a central principle in the decision in *Gouriet*'s case.

[120] The learned High Court judge added:

> [27] The Federal Court also referred the case of *Semenyih Jaya Sdn Bhd Pentadbir Tanah Daerah Hulu Langat and Another* [2017] 3 MLJ 561 for the established the principles that the power of judicial review is essential to the constitutional role of the courts, and inherent in the basic structure of the Federal Constitution. Every legal power must have legal limits and that every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. When government departments and public authorities have such great powers and influence, this is the most important safeguard so that the courts can see that these great powers and influence are exercised in accordance with law.

[121] Having quoted from *Chin Chee Kow*, the learned High Court judge said that the public prosecutor's decision to charge the respondent is subject to judicial review. We do not think that the construction adapted above was correct for the reasons which follow, we respectfully disagree with the learned High Court judge's view on art 145(3).

[122] Learned senior federal counsel submitted contrary to the findings of the learned High Court judge 'that the public prosecutor's discretion to bring prosecutions is not something that is outside the scope of judicial review', the

Federal Court's in *Chin Chee Kow* did not decide that the second appellant's prosecutorial powers which are given exclusively to him under art 145(3) of the Federal Constitution are reviewable.

[123] Before us, learned counsel for the respondent submitted in gist as follows:

(a) there is no doubt a long succession of cases in this country affirming the notion that prosecutorial discretions under art 145(3) of the Federal Constitution give and 'unfettered' discretion to the AG as the public prosecutor;

(b) however, this cannot be good law any longer in light of the recent Federal Court decision in *Chin Chee Kow*;

(c) thus, the notion that art 145(3) Federal Constitution gives the public prosecutor 'unfettered discretion' to prosecute is, with respect, no longer good law. The High Court in this matter correctly found, on the basis of *Chin Chee Kow* case that the public prosecutor's discretion to bring prosecution is not something that is outside the scope of judicial review; and

(d) with respect, no administrative or individual in Malaysia has 'unfettered discretion'. We are a Constitutional democracy, governed by the rule of law. Every discretion conferred on a public authority must be exercised in accordance with law. As such, there is no error made by the learned High Court judge in deciding that the decision by the second appellant as public prosecutor to bring charges against the respondent in breach of his immunity from prosecution is a decision that is amenable to judicial review.

[124] The passages from *Chin Chee Kow* case which the learned High Court quoted must be understood in the context of the legislation that was reviewed, namely s 9(1) of the GPA.

[125] With respect to the learned High Court judge, the Federal Court in *Chin Chee Kow* recognised and went on to say that the attorney general has unfettered discretion in relation to the prosecutor of criminal offence based on art 145 of the Federal Constitution. The Federal Court held as follows:

> The respondent herein did not file a suit to enforce criminal law. His application was for judicial review on the refusal of the Attorney General to grant him consent to file a civil proceeding. Granted, it cannot be disputed that the Attorney General has unfettered discretion in relation to prosecution of criminal offence based on Article 145 of the Federal Constitution. However, there is no such unfettered discretion in a non-criminal matter like this instant appeal.

[126] This point was simply not addressed by the learned High Court judge. A

[127] The effect and meaning of Article 145(3) of the Federal Constitution have been settled by a long line of decisions of the apex courts which have held that the decision of the Attorney General to institute or not to institute criminal proceedings is not justifiable or amendable to judicial review. (see: *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152 (FC) at p 158; *Johnson Tan Han Seng v Public Prosecutor; Soon Seng Sia Heng v Public Prosecutor; Public Prosecutor v Chea Soon Hoong; Teh Cheng Poh v Public Prosecutor* [1977] 2 MLJ 66 (FC) at p 70; *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 (PC) at p 56; *Public Prosecutor v Zainuddin & Anor* [1986] 2 MLJ 100 (SC) at p 103; *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544 (SC) at p 548; *Repco Holdings Bhd v Public Prosecutor* [1997] 3 MLJ 681 (CA) at p 689; and *Mohd Rafizi bin Ramli v Public Prosecutor* [2014] 3 MLJ 114 (CA) at at p 121) (see also: *Khairuddin Abu Hassan v Tan Sri Mohamed Apandi Ali* [2017] 4 CLJ 701) B C D

[128] The respondent's reliance on the Privy Council's comments in *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20 was unfounded, without merit and done without due consideration of the differences in the factual matrix, the constitutional provisions of the two countries and the cases cited and relied on by the Privy Council. E

[129] The same is true of the references to the Singapore cases of *Chang Suan Tze v Minister for Home Affairs* [1988] 2 SLR 525 and *Law Society of Singapore v Tan Guat Neo Phyllis* [2007] SGHC 207 which dealt with judicial review of administrative detentions and disciplinary proceedings. The issue regarding the prosecutorial powers of the Attorney General art 35(8) of the Singapore Constitution which is pari material with our art 145(3) was not the legal issues raised in the cases for the determination by the courts. For these reasons, the observations by Singapore Courts on the prosecutorial powers of the attorney general are irrelevant. F G

[130] It follows that the decision of the second appellant is not susceptible to judicial review. H

CONCLUSION

[131] Having carefully considered the law, the submissions and the facts, we allowed this appeal and set aside the declaration and orders made by the learned High Court judge. In their place, we would order that the judicial review application be dismissed. I

A *Appeal allowed.*

Reported by Ahmad Ismail Illman Mohd Razali

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